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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 788

AMERICUS QUINTANA, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF COLORADO, *Respondent.*

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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PREFATORY STATEMENT

We deem the statement of facts contained in petitioner's brief to be substantially conclusory. We, therefore deem it necessary to set forth a summary statement of ultimate fact, even though it may be to some extent repetitious. The references to the record are to the folio not the page, since the state record has been filed in this Court and is not presently available to respondent.

SUPPLEMENTAL STATEMENT

At the time the grand jury proceedings were initially commenced, two investigators, Kechter and Hawley, were present (R. f. 34). The two investigators were introduced to the grand jury and introduced as being available to assist the grand jury (R., f. 35). The grand jury was instructed by the trial court that witnesses were to appear before the grand jury singly and without the presence of any other person except the district attorney and one assistant. The investigators were present at the time the grand jury was ordered into session, which occurred within the view of the trial court.

The petitioner Quintana was subpoenaed to appear before the grand jury, which he did on Friday, August 30, 1963, at 1:25 A.M. The petitioner responded to the first two questions—his name and address. The remaining questions petitioner refused to answer on the basis of his privilege against self-incrimination. In substance, the remaining questions were as follows: Did you formerly reside at the Kenmark Hotel; is your nickname "Merks"; are you married; what is your business or occupation; are you an informer for Lieutenant Borden; do you have children; and did you attend school. At the conclusion of the questioning, the district attorney informed the witness that he viewed petitioner's action as an obstruction of justice and ordered the petitioner to appear before the district court at 9 A.M. in the morning, when he intended to ask the district court to hold the petitioner in contempt. (See R., Exhibit E).

The petitioner first appeared before the district court at 9:10, Friday, August 30th. Petitioner's counsel re-

quested a continuance until 1:30 in the afternoon, which request was granted (R., f. 89). Petitioner came before the trial court at 1:50 P.M. in the afternoon, at which time counsel asked for a further continuance in order to have additional time to prepare. The second continuance was granted (R., f. 93).

The next hearing was held Tuesday, September 3, 1963, at 9:25 A.M. At the commencement of the hearing, the trial court directed the exclusion of all persons who had no direct connection with the case, to which direction petitioner interposed no objection. The district attorney informed the trial court that petitioner had refused to answer all questions propounded by the grand jury on the basis of the privilege against self-incrimination. The position of the district attorney, as asserted to the trial court, was that the questions were not incriminating and that the refusal constituted contempt. The court ordered the questions and answers to be read by the grand jury reporter, which was accomplished (R., f. 98). The trial court then asked the petitioner whether, if he were directed to appear before the grand jury and answer these questions, "would your answer be the same", to which petitioner responded in the affirmative. The trial court then asked the petitioner if he had anything to say, to which he responded in the negative (R., f. 101). The trial court thereupon ruled that the questions would in no way incriminate the petitioner and that his refusal upon direction to answer constituted contempt (R., f. 102).

ARGUMENT

We will respond to the questions presented in the same order set forth by petitioner.

"The Witness Was Never Given A Clear-cut Choice In That He Was Never Ordered By The Court To Answer Any Question."

This "question presented" is difficult to respond to, since it is not supported by ultimate fact, but only petitioner's self-serving conclusion.

A cursory review of the ultimate facts reveals the pellucid dissimilarity between this case and *Quinn v. U. S.*, 349 U. S. 155, 99 L.Ed. 964, 75 S.Ct. 668 (1954), relied on by petitioner, assuming, arguendo, that its teachings are applicable to state proceedings.

The petitioner was directed to appear before the district court for the purpose of determining whether or not his action was contemptuous. When such hearing was held, after continuances at petitioner's request, the purpose of the hearing was stated by the district attorney to be for determination of whether the privilege of self-incrimination was properly available and, if not, whether the refusal constituted contempt. The court then inquired of the petitioner whether, if directed to appear before the grand jury and answer the questions, would his response be the same. Petitioner responded in the affirmative. Petitioner, therefore, was advised of the purpose for he was brought before the court and he was so again informed at the commencement of the hearing. The court then ruled that the

privilege was not available and directed him to respond. In this framework, he adhered to his blanket refusal.

The choice between compliance and non-compliance, and thereby risking appropriate punishment for non-compliance, could not be more "clear-cut."

"The Witness Was Never Advised Of His Rights While In The Grand Jury Room."

The relevancy of this point to the judgment of contempt under consideration is obscure. We are not here concerned with a criminal proceeding based in whole or part upon inculpatory testimony of the petitioner before a grand jury. Since petitioner fails to develop, argue, or support this "question" or otherwise frame it as a justiciable issue, we treat it in the same manner. More elemental is the fact that this issue was at no time presented to the trial court, and is therefore not properly before this court for the reason stated in our response to question four.

"The Witness Was Interrogated Before The Grand Jury In The Presence Of Prosecution Investigators Who Were Not Sworn And Whose Presence Was Unauthorized"

This "question" is equally obscure to the instant case. Firstly, although the presence of the investigators was not specifically ordered, it cannot be said, under the circumstances presented, that their presence was "unauthorized". Assuming, arguendo, that their presence was "unauthorized", what legal effect does such fact have on the judg-

ment of contempt? The only known legal effect is in support of a motion to quash the indictment when an unauthorized person is present during the taking of evidence and deliberations of the grand jury which results in the return of an indictment. Such is the minority rule. The better reasoned rule is that the presence of an unauthorized person under such circumstances, when the person is a public officer, does not nullify the indictment unless prejudice is shown. See annotation 4 ALR 2d 392. In no event does such fact nullify or destroy the jurisdiction or authority of the grand jury, which is the only legal result which would grant petitioner refuge in the instant case. Repetitiously, this question was not in any manner presented to the trial court.

> *"The Witness Was Subjected To Summary In Camera Proceedings In Which The Court Did Not Discuss The Nature Of Any Specific Question Asked By The Grand Jury And Imposed A Contempt Sentence Without Making Any Order Directing The Witness To Answer."*

In support of the fourth question, petitioner relies wholly on this court's decision in *In Re Oliver*, 333 U. S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948). The nature of the proceedings which incurred the umbrage of this court in *Oliver* was a grand jury proceedings which transformed into criminal proceedings instanter without benefit of counsel, knowledge of the nature of the charges, or basis thereof, right of confrontation or right to present evidence. Added to this was the refusal to supply a verbatim transcript of the grand jury proceedings resulting in the judgment of contempt. None of these factors exist in this case. Although alluding to the right of public hearing, as in-

dicated by this court, it was not called upon to determine the nature or extent of a person's right to a public trial in a state proceeding. Nor is this court called upon to so define in this case.

In Colorado, the extent of the right to a public hearing is clearly delineated. Indiscriminate exclusion of the public is prohibited. *Thompson v. People,* ..... Colo. ....., 399 P.2d 776 (1965). It goes without question, however, that such right may be waived by failure to object to the court's exclusionary order. *Benedict v. People,* 23 Colo. 126, 46 P. 437 (1896). In addition, failure to object forecloses review by the Colorado Supreme Court on writ of error. *Phelps v. People,* 152 Colo. 467, 382 P.2d 995 (1963); *Parrott v. People,* 144 Colo. 587, 357 P.2d 634 (1960); *Davis v. People,* 112 Colo. 452, 150 P.2d 67 (1944). The "question presented" was not properly before the Colorado Supreme Court, and it is, therefore, not justiciable in this court on certiorari, since no judgment of denial exists for review by this court. Additionally, since the question presented was properly not passed upon by the Colorado Supreme Court, the judgment is supported by an independent non-federal basis. *Cramp v. Board of Public Instruction,* 368 U. S. 278, 7 L.Ed. 2d 285, 82 S.Ct. 275 (1961).

CONCLUSION

As to the first question presented, the decision of the Colorado Supreme Court is in harmony with the pronouncements of this court. The second and third questions raise no relevant legal issue. The fourth question is adversely disposed of on an independent non-federal ground. The petition for a writ of certiorari must be denied.

Respectfully submitted,

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